

## That's the Ticket: A New Way of Defining Family

Angie Smolka

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# THAT'S THE TICKET: A NEW WAY OF DEFINING FAMILY

Angie Smolka<sup>†</sup>

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## INTRODUCTION

Once there was a tree . . . and she loved a little boy. And every day the boy would come and he would gather her leaves and make them into crowns and play king of the forest. He would climb up her trunk and swing from her branches and eat apples. And they would play hide-and-go-seek. And when he was tired, he would sleep in her shade. And the boy loved the tree . . . very much. And the tree was happy.<sup>1</sup>

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<sup>†</sup> J.D., Cornell Law School, 2001; B.S. University of Utah, 1996. I would like to thank Tina Groves for being my Primary Ticket Holder.

<sup>1</sup> SHEL SILVERSTEIN, *THE GIVING TREE* 1-23 (1964).

The children's book, *The Giving Tree*, tells the story of a relationship between a tree and a little boy.<sup>2</sup> The tree was the boy's caretaker; she played with him, gave him sustenance and shelter, and above all, loved him unconditionally.<sup>3</sup> Although this story could serve as a metaphor for the traditional parent-child relationship, it could also represent many different types of caring relationships where there is no biological tie or legal relationship.

Traditionally, the law defines a family as a group of individuals related by blood, marriage, or adoption.<sup>4</sup> However, millions of Americans are structuring their lives outside of the traditional notion of family recognized at law.<sup>5</sup> Social and technological changes have caused a multiplication of various family forms distinctly different from this traditional definition, including heterosexual cohabitants (with or without children),<sup>6</sup> same-sex partners (with or without children),<sup>7</sup> single-parent households,<sup>8</sup> blended families,<sup>9</sup> networks of extended kin,<sup>10</sup> non-related individuals that form surrogate families,<sup>11</sup> and others. These familial ar-

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Kris Franklin, "A Family Like Any Other Family:" *Alternative Methods of Defining Family Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1029 (1992).

<sup>5</sup> *Married With Children? Not Likely/Survey: Traditional Family a Minority*, NEWSDAY, Nov. 25, 1999 at A38 (stating that only 26% of American households contain married couples with children, with 51% of those children living with their "two original parents").

<sup>6</sup> The 1970 census counted 523,000 unmarried heterosexual couples. By 1998, the number had risen to 4,236,000, with 1,520,000 households containing children under the age of 15. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. PPL-101, HISTORICAL TIME SERIES: LIVING ARRANGEMENTS OF ADULTS, UNMARRIED-COUPLE HOUSEHOLDS, BY PRESENCE OF CHILDREN: 1960 TO PRESENT, TABLE AD-2.

<sup>7</sup> One million six hundred seventy four thousand (1,674,000) respondents reported living with a same-sex partner, with 166,000 households containing children under the age of 15. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. PPL-101, UNPUBLISHED TABLES—MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE), TABLE 8—HOUSEHOLDS WITH TWO UNRELATED ADULTS, BY MARITAL STATUS, AGE, AND SEX.

<sup>8</sup> Single parents maintain 27.3 percent of family households with children under the age of eighteen. LYNNE M. CASPER & KEN BRYSON, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. P20-515, CURRENT POPULATION REPORTS: HOUSEHOLD AND FAMILY CHARACTERISTICS, MARCH 1998 (UPDATE).

<sup>9</sup> Families created by blending biological children, step children, adopted children, and foster children.

<sup>10</sup> Five and six-tenths percent (5.6%) of all children under 18 reside in the home of their grandparents. TERRY A. LUGAILA, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. P20-514, CURRENT POPULATION REPORTS: MARITAL STATUS AND LIVING ARRANGEMENTS, MARCH 1998 (UPDATE). One million four hundred forty six thousand (1,446,000) children under 18 live in the household of a relative other than a parent. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. PPL-101, UNPUBLISHED TABLES—MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE), TABLE 4—HOUSEHOLD RELATIONSHIP AND PRESENCE OF PARENTS FOR PERSONS UNDER 18 YEARS, BY AGE, SEX, RACE, AND HISPANIC ORIGIN [hereinafter TABLE 4].

<sup>11</sup> Non-family households account for 30.9 percent of U.S. households; 83.2 percent of these were individuals residing alone, while the remaining were comprised of non-related indi-

rangements all have the ability to provide for the material and psychological needs of their members, yet only some are given the socio-legal status "family" and the benefits and rights that accompany such a designation. This, along with the lack of uniformity in defining family relationships, makes it difficult for individuals to be sure of their rights and responsibilities. Arguably, this problem should be remedied by altering the way that the law defines family; "[i]f law does not reflect or even acknowledge institutions central to our lives, then it cannot truly serve its role as a social mediator and a protector of social values."<sup>12</sup>

So, what is to be done with the concept of family? In Part I, I will present various remedies offered to solve the problem of families falling outside the narrow categories established at law, and offer a critique of such remedies. I will then pose the question: What if we could start from scratch without common law or legal precedent to follow? What would be the most fair, equitable, and efficient way to legally recognize families? In Part II, I will lay out the groundwork for a new theory of family, called the Ticket System. At its most simplistic level, by exchanging Tickets with one another, individuals designate whom they want to have considered their family, complete with the legally concomitant rights, privileges, and responsibilities. Although this is a largely impractical proposal, I hope that it will change the way that people think about familial relationships and inform the debate about what should be done to ensure that all families are protected and valued.

## I. CHANGING THE DEFINITION OF FAMILY

There are those that function as a family and are dedicated and devoted to one another, who do not receive the law's protections. Equally troubling are those instances where individuals use the legal designation of family merely to receive benefits, access to economic wealth, or other status afforded by marriage, parentage, or other family relations.<sup>13</sup> Such inequity has mobilized some judges, politicians, lawyers, scholars, and activists, creating a subtle shift in the legal landscape for nontraditional families. However, most of the remedies offered seem inadequate in one

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viduals residing together. CASPER & BRYSON, *supra* note 8. One million six hundred forty three thousand (1,643,000) children under 18 live in the household of a non-relative. TABLE 4, *supra* note 10.

<sup>12</sup> Franklin, *supra* note 4, at 1068.

<sup>13</sup> Examples of this would include sham weddings for immigration purposes, or long lost relatives coming out of the woodwork upon a family member winning the lottery or becoming a celebrity. One particularly egregious example occurred February 15, 2000 when the Fox television network presented "Who Wants to Marry a Multimillionaire?" *Fox Mocks Love, Trust: Another View*, SALT LAKE TRIB., Feb. 19, 2000, at A10. In this combination beauty pageant/game show, a millionaire bachelor selected his wife from fifty contestants. *Id.* The "winner" promptly married the millionaire bachelor minutes after seeing him for the first time. *Id.* The couple divorced a short time later.

way or another. Unfortunately, within an inequitable framework, sometimes the only solution is dismantling that framework and starting over.

#### A. EQUITABLE JUDICIAL REMEDIES

In the following section, I will discuss two ways that the judiciary has attempted to alleviate some of the harsh results found when those who fall outside the traditional definition of family turn to the law for protection. Although it is commendable that courts are attempting to adapt the law to respond to the changes in society, the results have been less than ideal.

##### 1. *Implied Cohabitation Contracts*

The landmark case of *Marvin v. Marvin* is one of the earliest examples of the law of modifying familial concepts to accommodate societal changes. Since that time, courts have become increasingly willing to give some of the traditional benefits of marriage to cohabitants upon dissolution of a relationship.<sup>14</sup>

In *Marvin*, a woman gave up her career in the entertainment field to serve as a "companion, homemaker, housekeeper and cook" for her male partner in return for his provision of "all of [her] financial support and needs for the rest of her life."<sup>15</sup> Upon dissolution of the relationship, the woman was forced to rely on unemployment insurance benefits to support herself, while her ex-partner's property at the time of separation exceeded \$1,000,000.<sup>16</sup> Ms. Marvin sued to enforce an implied contract whereby she was entitled to half of the property acquired during the relationship and support payments.<sup>17</sup>

The Supreme Court of California found that "courts should enforce express contracts between nonmarital partners, [and] [i]n the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other understanding between the parties."<sup>18</sup> The court also suggested the use of constructive or resulting trusts, quantum meruit, and "additional equitable remedies to protect the expectations of parties to a nonmarital relationship in cases in which existing remedies prove inadequate."<sup>19</sup>

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<sup>14</sup> *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976).

<sup>15</sup> *Id.*

<sup>16</sup> *Marvin v. Marvin*, 5 Fam. L. Rep. (BNA) 3077 (Cal. 1979).

<sup>17</sup> *Marvin*, 557 P.2d at 110.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at n.25.

Fifteen states have adopted the *Marvin* approach, at least in part,<sup>20</sup> giving cohabitating couples some legal benefits.<sup>21</sup> Nonetheless, the decision provided little assistance to Ms. Marvin<sup>22</sup> and has not benefited other couples to a great degree. Frequently, the law fails to recognize heterosexual cohabitants as similar to spouses in regards to car insurance,<sup>23</sup> health insurance,<sup>24</sup> unemployment benefits,<sup>25</sup> the marital commu-

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<sup>20</sup> See *Carroll v. Lee*, 712 P.2d 923 (Ariz. 1986); *Boland v. Catalano*, 521 A.2d 142 (Conn. 1987); *Glasgo v. Glasgo*, 410 N.E.2d 1325 (Ind. App. 1980); *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977); *Hudson v. DeLonjay*, 732 S.W.2d 922 (Mo. App. 1987); *Kinkennon v. Hue*, 301 N.W.2d 77 (Neb. 1981); *Hay v. Hay*, 678 P.2d 672 (Nev. 1984); *Rolle v. Rolle*, 530 A.2d 847 (N.J. Sup. 1987); *Dominguez v. Cruz*, 617 P.2d 1322 (N.M. App. 1980); *McCullon v. McCullon*, 410 N.Y.S.2d 226 (1978); *Ireland v. Flanagan*, 627 P.2d 496 (Or. App. 1981); *Knauer v. Knauer*, 470 A.2d 553 (Pa. Super. 1983); *Goode v. Goode*, 396 S.E.2d 430 (W. Va. 1990); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987); *Kinnison v. Kinnison*, 627 P.2d 594 (Wyo. 1981).

<sup>21</sup> See *Donovan v. Workers' Comp. Appeals Bd.*, 187 Cal. Rptr. 869 (1982) (allowing good faith members of employee's household to be considered dependent and entitled to workers compensation benefits); *Solomon v. District of Columbia*, 21 Fam. L. Rep. (BNA) 1316 (D.C. Super. Ct. 1995) (allowing a deceased woman's lesbian partner to prove that she was next of kin to maintain a wrongful death action); *Reep v. Comm'r of Dep't of Employment & Training*, 593 N.E. 2d 1297 (Mass. 1992) (holding that the fact that former employee was not married to her relocating partner of 13 years did not preclude determination that she had "urgent, compelling and necessitous" reason to leave her employment); *Dunphey v. Gregor*, 642 A.2d 372 (N.J. 1994) (holding that bystander's ability to recover for emotional distress upon witnessing injury is not necessarily limited to relationships of marriage or blood).

<sup>22</sup> On remand the trial court awarded Ms. Marvin \$104,000 under equity, in order to acquire employable skills with which to support herself. *Marvin v. Marvin*, 5 Fam. L. Rep. (BNA) 3077 (Cal. 1979). The appellate court reversed the trial court's award because Mr. Marvin "never had and did not then have any obligation to provide [Ms. Marvin] with a reasonable sum for support and maintenance." *Marvin v. Marvin*, 176 Cal. Rptr. 555, 559 (1981). One day after the appellate court's reversal, Ms. Marvin, age 57, was fined \$250 and placed on probation for shoplifting bras and a sweater. HARRY D. KRAUSE ET AL., *FAMILY LAW: CASES COMMENTS AND QUESTIONS* 234 (4th ed. 1998).

<sup>23</sup> *Wood v. State Farm Mut. Auto. Ins. Co.*, 429 A.2d 1082 (N.J. 1981) (holding that a woman who had been living and sharing expenses with the insured for approximately three and one-half years prior to the accident was not entitled to coverage under the terms of an automobile insurance policy extending personal injury protection coverage to members of named insured's family residing in his household).

<sup>24</sup> I.R.S. Priv. Ltr. Rul. 9603011 (Jan. 19, 1996), 1996 WL 18211 (stating that employer benefits made available to domestic partners will be taxed as income); I.R.S. Priv. Ltr. Rul. 9034048 (Aug. 24, 1990), 1990 WL 700170 amended by I.R.S. Priv. Ltr. Rul. 9111018 (Mar. 15, 1991), 1991 WL 77745 (stating that employer benefits made available to nonspouse cohabitants will be taxed as income).

<sup>25</sup> *Norman v. Unemployment Ins. Appeals Bd.*, 663 P.2d 904 (Cal. 1983) (holding that termination of employment in order to follow nonmarital "loved one" to a location did not constitute "good cause" for purposes of determining eligibility to receive unemployment compensation benefits). But see *Macgregor v. Unemployment Ins. Appeals Bd.*, 689 P.2d 453 (Cal. 1984) (holding that when a woman moved with her cohabitant and their child there was "good cause," thus allowing her to receive employment benefits).

nication privilege,<sup>26</sup> wrongful death actions,<sup>27</sup> survivors benefits under Social Security,<sup>28</sup> tax preferences,<sup>29</sup> or joint bankruptcy.<sup>30</sup>

Also, states that provide cohabitation remedies to heterosexual couples may not provide them to same-sex couples. For example, when the California courts considered a same-sex couple case analogous to *Marvin*, they chose not to enforce an implied contract. In *Jones v. Daly*, Mr. Jones acted as companion, homemaker, traveling companion, housekeeper, and cook to Mr. Daly, in return for an agreement of support.<sup>31</sup> After Mr. Daly's death, Mr. Jones sued the estate for declaratory relief and a division of the property acquired throughout the relationship.<sup>32</sup> Mr. Jones was unsuccessful in his claim because the court found that the rendition of sexual services "was the predominate consideration" under the contract,<sup>33</sup> rather than the time spent in providing domestic services.<sup>34</sup> This view of same-sex couples as fundamentally different from their heterosexual counterparts prevents these couples from using precedent such as *Marvin* to their benefit.<sup>35</sup>

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<sup>26</sup> *People v. Delph*, 156 Cal. Rptr. 422 (1979) (holding that the common law and statutory marital communication privilege does not extend to cohabitants who have established a marriage-like relationship).

<sup>27</sup> *Garcia v. Douglas Aircraft Co.*, 184 Cal. Rptr. 390 (1982) (holding that fiancée of decedent, who was engaged to marry decedent eight days after his death and who had cohabited with him, was not entitled to bring wrongful death action); *Harrod v. Pac. Southwest Airlines*, 173 Cal. Rptr. 68 (1981) (holding that meretricious spouse of decedent was not an "heir" who could bring a wrongful death action, and that the statute excluding meretricious spouses from bringing wrongful death actions did not deny such individuals equal protection of laws).

<sup>28</sup> *Califano v. Boles*, 443 U.S. 282 (1979) (denying woman benefits under Section 202(g)(1) of the Social Security Act because she was never married to the wage earner who fathered her child).

<sup>29</sup> *In re Edgett*, 68 Cal. Rptr. 686 (1980) (holding that a former wife of a testator who had resumed cohabiting with deceased four years after the dissolution of their marriage, held themselves out to friends and neighbors as husband and wife, shared a condominium, and jointly paid their bills, was treated as an unrelated transferee under section 13309 of the Rev. & Tax Code, rather than as a wife under section 13307).

<sup>30</sup> *In re Allen*, 186 B.R. 769 (Bankr. N.D. Ga. 1995) (holding that it is necessary for a couple to be legally married in order to file joint bankruptcy).

<sup>31</sup> *Jones v. Daly*, 176 Cal. Rptr. 130, 131 (1981).

<sup>32</sup> *Id.* at 130.

<sup>33</sup> *Id.* at 133.

<sup>34</sup> Compare *Jones*, 176 Cal. Rptr. 130, with *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). In *Marvin*, the court found that the sexual relationship between Mr. and Ms. Marvin was severable from the rest of the contract and only considered Mr. Marvin's promise of lifelong support and equal share of the property, in return for Ms. Marvin's agreement to be a companion, homemaker, housekeeper, and cook. *Marvin*, 557 P.2d at 116, n.5. It is necessary for the sexual services to be severable from the rest of the contract, because courts are unwilling to enforce a cohabitation contract "to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual service." *Id.* at 112.

<sup>35</sup> But see *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (1988). In *Whorton*, sexual services were severable from the rest of the contract, because the services Mr. Whorton provided his partner, such as being his chauffeur, bodyguard, secretary, and real-estate counselor, in

## 2. *The Functional Approach*

Another way the judiciary has expanded the legal concept of family is through the application of the "functional approach." Under this approach, social arrangements are organized around the household, where "a household becomes the functional equivalent of a family."<sup>36</sup> One example of courts applying this approach occurred in the case of *Braschi v. Stahl Associates*.<sup>37</sup> In that case, a New York court upheld the right of the same-sex partner of a deceased leaseholder to qualify as a family member under the state rent control laws, and thus maintain residence in the couple's apartment.<sup>38</sup>

In deciding this case, the court attempted to consider the totality of the relationship by considering a number of factors, such as "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties [had] conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."<sup>39</sup> Although the court stated that none of these factors should be dispositive, and that the "dedication, caring and self-sacrifice of the parties should . . . control," it is difficult to see how the court would make this determination absent the enumerated factors.<sup>40</sup> Indeed, the court did not discuss the couple's level of devotion to one another, instead they recited the amount of time they had lived together, that Braschi listed the address on his driver's license and passport, and received all correspondence at that address, and that the couple "were authorized signatories of three safe-deposit boxes, they maintained joint checking and savings accounts, and joint credit cards."<sup>41</sup>

Rather than truly looking at the function of the couples, it seems as though the court was looking at criteria that one would hope to find in a stereotypical 1950s marriage. With the day-to-day realities of our complex society, it is easy to see the potential problems with such an approach. What if a couple relies on restaurants, dry cleaners, and the like to obtain "daily family service," or wants to keep their finances separate for reasons ranging from tax planning to government benefits eligibility,

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addition to confidant and companion, are the type that one would normally be paid for. *Id.* at 406-07, 409. Thus, Mr. Whorton was able to recover. *Id.* The court distinguished this case from *Jones*, by stating that *Jones* was "factually different in that the complaining party did not allege contracting to provide services apart from those normally incident to the state of cohabitation itself." *Id.* at 410. However, neither did Ms. Marvin, and she was still able to enforce the implied contract. *Marvin*, 557 P.2d. at 110.

<sup>36</sup> Rebecca L. Melton, Note, *The Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of Family*, 29 J. Fam. L. 497, 498 (1990/1991).

<sup>37</sup> 543 N.E.2d 49 (N.Y. 1989).

<sup>38</sup> *Id.* at 55.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*



or works in different cities and only sees one another on the weekends? Does this mean a couple is less committed than their married counterparts, who are not required to share checking accounts and credit cards, live together, be monogamous, or even love each other?<sup>42</sup>

As it turns out, the functional approach is not only problematic in its application, but has been of little practical benefit to nontraditional families. New York courts have limited the holding of *Braschi* to its facts,<sup>43</sup> and have refused to extend the functional approach to estates<sup>44</sup> and same-sex partners for wrongful death claims,<sup>45</sup> and have not allowed a same-sex partner to elect against decedent's will as a surviving spouse,<sup>46</sup> refused to allow a lesbian co-parent access to her non-biological child,<sup>47</sup> refused to protect confidential communications between same-sex partners,<sup>48</sup> and not allowed same-sex partners to reside together in university married-student housing.<sup>49</sup>

## B. USE OF EXISTING LEGAL DEVICES

Rather than relying on the courts, some nontraditional families have made creative use of existing legal devices in order to replicate certain familial benefits. However, as with judicial equitable remedies, these approaches are fraught with problems.

### 1. *Tools for Dealing with Medical Emergencies and Death*

Because nontraditional families are not afforded equal status under the law, they often face legal battles and invalid presumptions at the time when their loved ones are in crisis. Such a situation occurred when Karen Thompson's partner of four years, Sharon Kowalski, was left physically and mentally impaired after an accident with a drunk driver.<sup>50</sup> Kowalski's father, who was not aware of his daughter's relationship at the time of the accident, was granted guardianship.<sup>51</sup> He subsequently banned Ms. Thompson from seeing his daughter until his own health problems caused him to relinquish guardianship.<sup>52</sup> Ms. Thompson petitioned for guardianship, but it was granted to a friend of the family who did not seek the charge.<sup>53</sup> Upon review, the court of appeals found that

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<sup>42</sup> See *supra* note 13 and accompanying text.

<sup>43</sup> *In re Estate of Lasek*, 545 N.Y.S.2d 668 (Sur. 1989).

<sup>44</sup> *Id.* at 670.

<sup>45</sup> *Raum v. Rest. Assocs.*, 675 N.Y.S.2d 343 (App. Div. 1998).

<sup>46</sup> *In re Cooper*, 592 N.Y.S.2d 797 (App. Div. 1993).

<sup>47</sup> *Alison D. v. Virginia M.*, 552 N.Y.S.2d 321 (App. Div. 1990).

<sup>48</sup> *Greenwald v. H & P 29th St. Assocs.*, 659 N.Y.S.2d 473 (App. Div. 1997).

<sup>49</sup> *Levin v. Yeshiva Univ.*, 691 N.Y.S.2d 280 (Sup. 1999).

<sup>50</sup> *In re Guardianship of Kowalski*, 478 N.W.2d 790, 791 (Minn. App. 1991).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 791-92.

not only did Ms. Kowalski express a preference to live with Ms. Thompson, but the medical professionals all agreed "that Thompson: (1) achieve[d] outstanding interaction with Sharon; (2) ha[d] extreme interest and commitment in promoting Sharon's welfare; (3) ha[d] an exceptional current understanding of Sharon's physical and mental status and needs, including appropriate rehabilitation; and (4) [was] strongly equipped to attend to Sharon's social and emotional needs."<sup>54</sup> Eight years after the initial accident, the court of appeals' decision reunited Ms. Kowalski and Ms. Thompson. Despite their eventual reunion, it is troubling that Ms. Thompson had to go through the time, expense, and emotional drain of several court proceedings while dealing with her partner's devastating condition, and that Ms. Kowalski's recovery was delayed by her unnecessary absence from Ms. Thompson.<sup>55</sup>

In order to avoid some of these problems, nontraditional families may employ devices such as power of attorney and health-care proxy. Power of attorney authorizes an individual to handle another's financial responsibilities, such as paying taxes, applying for benefits, paying bills or borrowing money, if that person becomes incapacitated.<sup>56</sup> Health-care proxy<sup>57</sup> gives designated individuals priority to decide what medical measures doctors should take in an emergency.<sup>58</sup> If such a preference is not made, state statutes "grant legal relatives, in declining levels of consanguinity the power to act on behalf of the incompetent" with no suggestion that "a lover or close friend of the patient might, in some circumstances, be a better proxy decisionmaker than a legal relative."<sup>59</sup>

Much like the presumptions covering medical decision making, statutes governing the distribution of property, inheritance, and taxation of inheritance are designed to accommodate traditional families.<sup>60</sup> Thus, alternative families must employ careful estate planning to ensure that their loved ones are cared for after their deaths. Such strategies include listing any common property as owned jointly with right of survivorship, so that upon one partner's death, the property will revert to the survivor;<sup>61</sup> naming the other member of the couple as the beneficiary on bank or brokerage accounts, life-insurance policies, or employee-benefit plans;<sup>62</sup> and creating a living trust, where the creator names herself trus-

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<sup>54</sup> *Id.* at 793-94.

<sup>55</sup> *Id.* at 794.

<sup>56</sup> Deborah Lohse, *Unmarried Couples Can Face Tricky Financial Planning*, WALL STREET J., Mar. 29, 1994, at C1.

<sup>57</sup> This is known as medical durable power of attorney in some states.

<sup>58</sup> *Id.*

<sup>59</sup> Amy L. Brown, *Broadening Anachronistic Notions of "Family" in Proxy Decision-making For Unmarried Adults*, 41 HASTINGS L.J. 1029, 1036-37 (1990).

<sup>60</sup> Melton, *supra* note 36, at 506.

<sup>61</sup> Lohse, *supra* note 56.

<sup>62</sup> *Id.*

tee and her partner co-trustee, so that one may sell, exchange or spend the assets if the other becomes incapacitated.<sup>63</sup> Additionally, "unmarried partners should take steps to ensure that their will could withstand a legal challenge by disgruntled relatives."<sup>64</sup> Each party should contact their own lawyer, and in the case of a debilitating illness, a physician should offer a signed opinion that the party was aware of her actions.<sup>65</sup>

Although devices such as power of attorney or living trusts can take up where the law leaves off, they are very piecemeal in their approach and do not grant the overarching benefits and protections that come from the legal designation "family." In addition, not all such families will have the means or the know-how to obtain these legal documents. In specific reference to the property distribution structures, such scenarios assume valuable property that one would want to invest in protecting; however such property solutions do little to remedy these concerns of those with limited belongings and resources. As one commentator noted:

The "estates" of lower income people typically consist (at most) of Social Security survivors' benefits, workers' compensation death benefits, and the like; in contrast, wealthier persons accumulate large amounts of property and make wills about its disposition. While it is possible to consult an attorney and draft around the estate laws so as to protect a [survivor], the death benefits important to poor people turn upon marital status.<sup>66</sup>

Also difficult is the fact that medical emergencies and death are situations that most would rather not think about and plan for. Arguably, this is the reason that the law has a default scheme in place to begin with. Rather than putting the responsibility on individuals to remedy the law's shortcomings, the law should respond and protect such individuals.

## 2. *Adult Adoption*

In an attempt to receive the comprehensive benefits and protections that come with the designation of family, some have employed adult adoption. This is the practice of one adult legally adopting another to create a bona fide family relationship. All states except Alabama and Nebraska offer some form of adult adoption, although many statutes

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 766 (1996).

place varying restrictions upon it.<sup>67</sup> The primary effect of adult adoption is the creation of inheritance rights in the adoptee, but there are other advantages.<sup>68</sup> Through adoptions, adults can obtain next-of-kin rights that allow decision-making in case of emergency or incapacity, and visitation rights upon hospitalization or imprisonment.<sup>69</sup> Adult adoption also allows for recovery in tort actions and beneficiary privileges under some insurance policies, retirement funds, and employee benefit packages.<sup>70</sup>

Although this practice confers the wide-ranging benefits usually reserved for traditional families, there are definite drawbacks. One problematic aspect is that adult adoption is irrevocable, except in cases of fraud or undue influence,<sup>71</sup> and destroys the adoptee's legal relationship with his natural parents, also terminating inheritance rights.<sup>72</sup> One problem specific to romantic couples using adoption is the psychological impact of forming a "parent-child" relationship with one's partner, even if it is only a legal designation.<sup>73</sup> Additionally, such a parent-child designation between adult sexual partners could lead to prosecution for incest, despite the nonexistence of consanguinity.<sup>74</sup>

Rather than encouraging individuals to engage in a legal fiction and tread uncomfortably close to taboo, the law should instead encourage the formation of adult relationships of mutual caring and support by extending legal benefits and protections to them.

### C. ACTIVISTS AND LAWMAKERS

Rather than relying on the piecemeal protections offered by the manipulation of legal devices and terms, advocates of lesbian, gay, and bisexual [hereinafter LGB] rights have been seeking recognition of nontraditional families through a comprehensive scheme.

#### 1. *Domestic Partnership*

Domestic partnership regulations, present in various cities, counties, and states throughout the country, allow same-sex couples who meet certain criteria to register as domestic partners. Although these registration systems give same-sex partners the chance to have some legal recognition of their relationship, it is very far from creating parity with hetero-

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<sup>67</sup> Gwendolyn L. Snodgrass, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 81 (1998).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 82.

<sup>70</sup> *Id.* at 83.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 84.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 85.

sexual relationships.<sup>75</sup> Instead such laws are creating a second-class version of marriage.

The benefits given under these laws are very slight; they primarily extend health insurance and sick leave/bereavement leave to the registered partners of employees of the State.<sup>76</sup> In addition to applying to a very small number of people and providing minimal benefits, domestic partners are taxed on any health insurance benefits that they receive for their partner, because such benefits are considered part of the worker's gross income.<sup>77</sup> To become entitled to these sparing benefits, same-sex couples give "the state the power to regulate [their] primary relationship," and agree to closely conform their conduct to the idealized heterosexual marriage.<sup>78</sup> This mimicking of traditional marriage prevents the reconceptualization of family; it merely expands who is let in to the law's protections, while still leaving others out.<sup>79</sup>

In addition to not providing the benefits of marriage, domestic partnerships do not provide the protections of marriage. One example of this is the failure of most domestic partnership laws to offer any sort of protection at the dissolution of the relationship. This is especially problematic when considering the fact that the nation is in the middle of a "gayby" boom, with about 2 million school-aged children being raised by same-sex couples.<sup>80</sup> Since the children of domestic partners are not explicitly considered in such laws, it is up to the courts to determine the custody of any children. Often, this means that courts will emphasize biology in determining custody,<sup>81</sup> instead of considering other factors such as the intentions of the parties when conceiving the child, the function of the family before its dissolution, or the child's interest in maintaining the relationship with the non-biological co-parent.

The State of Vermont recently took strides to lessen the disparity between domestic partnership and marriage. On December 20, 1999, the Vermont Supreme Court ruled that same-sex couples must be given the

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<sup>75</sup> Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family* 104 HARV. L. REV. 1640, 1658 (1991).

<sup>76</sup> Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, n.32 (1991).

<sup>77</sup> I.R.S. Priv. Ltr. Rul. 9603011, *supra* note 24.

<sup>78</sup> Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in OUT/LOOK: NAT'L LESBIAN & GAY Q., Autumn 1989, at 8-12.

<sup>79</sup> MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 1-2 (1995) (discussing her experience as a Commissioner on the Madison Wisconsin Equal Opportunities Commission when it first considered an Alternative Family Ordinance).

<sup>80</sup> L.Z. Granderson, *My Two Moms*, GRAND RAPIDS PRESS, July 11, 1999, at A19.

<sup>81</sup> See *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (App. 1991); *Music v. Rachford*, 654 So. 2d 1234 (Fla. App. 1995); *Kulla v. McNulty*, 472 N.W.2d 175 (Minn. App. 1991); *In re Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *In re Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (App. Div. 1994).

same benefits and protections that are given to married couples, but left it up to the legislature to decide whether the equalization of benefits would come through allowing same-sex couples to marry, or whether it would be achieved through a system of domestic partnership.<sup>82</sup> On April 26, 2000, the Governor of Vermont signed a bill that gave same-sex couples the same rights and responsibilities available under state law to married couples, including divorce-like proceedings at the termination of a relationship.<sup>83</sup> The law, which took effect July 1, 2000, gives same-sex couples access to more than 300 rights derived from Vermont state law, including inheritance, property transfers, medical decisions, insurance, and joint filing of state taxes.<sup>84</sup> These "Civil Unions," the most comprehensive system of domestic partnership in the country, create parity between domestic partnership and marriage at a state level.<sup>85</sup> However, federal laws and states other than Vermont will not recognize such couples.<sup>86</sup>

## 2. *Same-Sex Marriage*

Because domestic partnership laws and ordinances do not offer all the benefits of marriage, some are advocating for an expansion of traditional marriage rights to same-sex couples. Yet, this idea faces opposition from those against, as well as in favor of, LGB rights. As many LGB organizations have put marriage at the forefront of the their agenda,<sup>87</sup> there has been a great deal of opposition by conservative and religious groups, resulting in the passage of anti-same-sex-marriage pieces of legislation at both the state and national level. The Federal Defense of Marriage Act declared that states do not have to give full faith and credit to the acts and judgments of other states in regards to

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<sup>82</sup> Christopher Graff, *Vermont Supreme Court Calls Rights for Gay Couples "Constitutionally Required:" Ruling Described as First of Its Kind in the United States*, LEGAL INTELLIGENCER, Dec. 21, 1999, at 4.

<sup>83</sup> *Vermont First in Nation to OK Gay Civil Unions*, CHICAGO TRIB., Apr. 27, 2000, at 18.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See American Civil Liberties Union: Lesbian and Gay Rights Project, at <http://www.aclu.org/issues/gay/hmg1.html>; Family Pride Coalition, at <http://www.familypride.org>; Gay and Lesbian Advocates and Defenders, at <http://www.glad.org>; Gay and Lesbian Alliance Against Defamation, at <http://www.glaad.org>; Gay and Lesbian Victory Fund, at <http://www.victoryfund.org>; Human Rights Campaign, at <http://www.hrc.org>; Lambda Legal Defense and Education Fund, at <http://www.lambdalegal.org>; Lesbian and Gay Immigration Rights Task Force, at <http://www.lgirtf.org>; National Black Lesbian and Gay Leadership Forum, at <http://www.nblglf.org>; National Center for Lesbian Rights, at <http://www.nclrights.org>; National Freedom to Marry Coalition, at <http://www.ftm.org>; National Gay and Lesbian Task Force, at <http://www.nglftf.org>; The National Latina/o Lesbian, Gay, Bisexual & Transgender Organization, at <http://www.llego.org>; National Organization for Women, at <http://www.now.org>; Parents and Friends of Lesbians and Gays, at <http://www.pflag.org>.

same-sex marriage,<sup>88</sup> and defined marriage as a relationship between only a man and woman.<sup>89</sup> Although this is most likely unconstitutional,<sup>90</sup> it is doubtful that the Supreme Court will consider the Act any time soon.<sup>91</sup>

States are also responding with anti-same-sex-marriage initiatives. As of 2000, 32 states had adopted some form of anti-same-sex marriage legislation.<sup>92</sup> In those states, the anti-marriage measures are being used to block other pro-LGB legislation. For example, right-wing legal organizations have sought to invalidate domestic partnership ordinances adopted by local governments in Florida,<sup>93</sup> Illinois,<sup>94</sup> and Virginia.<sup>95</sup> Those challenging benefits for same-sex couples claim that anti-same-sex marriage laws set forth a "public policy" that only married, mixed-sex couples can be granted governmental benefits or rights in those states.

Despite such setbacks, proponents provide several arguments in support of same-sex marriage. One argument is that same-sex couples should have the same right to enter the important societal institution of marriage and partake of the "substantial economic and practical advantages" that result.<sup>96</sup> Such a view implicitly assumes that the cultural sig-

<sup>88</sup> Defense of Marriage Act, 28 U.S.C.A. § 1738C.

<sup>89</sup> Defense of Marriage Act, 1 U.S.C.A. § 7.

<sup>90</sup> See generally Larry Kramer, *The Public Policy Exception and the Problem of Extra-Territorial Recognition of Same-Sex Marriage*, 16 Q.L.R. 153 (1996); Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 Q.L.R. 221 (1996).

<sup>91</sup> In order for the constitutionality of DOMA to be considered, a state would first have to allow same-sex marriage. Once a couple was married in that state, they would then need to become residents of a state that did not allow same-sex marriage. The couple would then have to bring a claim against the state, which would have to make its way through the federal court system. Only then would review by the Supreme Court be a possibility. However, the court usually refrains from hearing such cases until similar claims have been brought in several different circuits.

<sup>92</sup> Those states are AK, AL, AR, AZ, CA, CO, DE, FL, GA, HI, IA, ID, IL, IN, KS, KY, LA, MI, ME, MN, MS, MT, ND, NC, OK, PA, SD, TN, UT, VA, WA, and WV. Lambda Legal Defense and Education Fund, *A Historic Victory: Civil Unions for Same-Sex Couples — What's Next?*, at <http://www.lamdalegal.org/cgi-bin/pages/documents/record?record=578> (July 6, 2000).

<sup>93</sup> David Flesher & Buddy Nevins, *Domestic Benefits Come Under Attack; Broward's Proposal for County Employees Challenged Hardest by Those Who Oppose the Gay Lifestyle*, SUN-SENTINEL (Fort Lauderdale), Jan. 21, 1999, at 1A.

<sup>94</sup> Crawford v. Chicago, 710 N.E.2d 91, 98 (Ill. App. 1999).

<sup>95</sup> Arlington County v. White, 528 S.E.2d 706 (Va. 2000) (holding that the county's inclusion of domestic partners under the term dependent was unreasonable, thus denying health insurance benefits to such individuals); see also Holly A. Heyser, *VA Supreme Court Annuls Domestic Partner Benefits*, VIRGINIAN PILOT AND STAR LEDGER (Norfolk), Apr. 22, 2000, at A1.

<sup>96</sup> Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in OUT/LOOK: NAT'L LESBIAN & GAY Q., *supra* note 78; Evan Wolfson, *Why We Should Fight for the Freedom to Marry*, in SAME-SEX MARRIAGE: PRO AND CON 128, 129 (Andrew Sullivan ed., 1997).

nificance of the institution of marriage, with its benefits, rights, rewards, and subsidies, is only problematic in that it leaves out same-sex couples. However, many people — gay and straight — do not receive the benefits of marriage. Cultural norms that place greater emphasis on extended families cause people of color to marry at lower rates.<sup>97</sup> This phenomenon would make it less likely that lesbian, gay, and bisexual individuals of color would participate in, or receive the benefits from same-sex marriage.<sup>98</sup> Those in poverty are also less likely to partake in marriage because the economic benefits associated with marriage decrease as the level of poverty increases.<sup>99</sup> This effect would likely carry over to same-sex couples in poverty.<sup>100</sup>

Another problem with the pursuit of same-sex marriage is that it is antithetical to the way that many LGB individuals live their lives. There is evidence that, like other outsider groups,<sup>101</sup> LGB communities tend to organize their lives around more extended support systems outside of the nuclear family.<sup>102</sup> This may be because many LGB individuals are often alienated from their blood families once they “come out of the closet.” These individuals go on to form familial relationships with others in the LGB community.<sup>103</sup> These surrogate families function in a way very similar to other families; they celebrate holidays together, console each other during hard times, and care for one another in times of crisis.<sup>104</sup> This is especially true in the context of the AIDS epidemic, “where often a large group of people — ex-mates and their friends and lovers — tend the sick and maintain the final watch.”<sup>105</sup> Because these informal arrangements serve such vital purposes to the LGB community, they should be maintained and valued as same-sex couples try to legitimize their relationships.

Because many LGB individuals have formed their families outside of the law, they have developed many creative formations of family that respond to current societal challenges.<sup>106</sup> To advocate that same-sex couples enter into traditional marriage, an institution that is already

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<sup>97</sup> Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”? *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1370–71 (2000).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> People of color, those in poverty, and the working class are also more likely to follow extended kinship arrangements, rather than the more traditional nuclear family. Franklin, *supra* note 4, at 1047.

<sup>102</sup> Frank Browning, *Why Marry?*, in SAME-SEX MARRIAGE: PRO AND CON, *supra* note 96, at 132, 134.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*



fraught with problems “could stifle one of the richest and most creative laboratories of family experience.”<sup>107</sup> Rather than expanding the rights of some to marry, a more helpful strategy would be seeking “civic and legal support for different kinds of relationships that can address the emotional, physical and financial obligations of contemporary life.”<sup>108</sup>

#### D. INTERGENERATIONAL DEPENDENCY — ONE SCHOLAR’S APPROACH

In her groundbreaking book, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, Professor Martha Fineman critiques the way that family is defined and offers her own solution.<sup>109</sup> Fineman is concerned that only those “relationships that could be analogized to marriage” are considered in attempts to expand the category of family.<sup>110</sup> Fineman critiques the fact that the “sexual core” (a horizontal tie between sexual affiliates) is the center of the family, when other relationships in our society, such as the vertical intimacy between a parent and child, are much more stable.<sup>111</sup> Fineman proposes to abolish marriage as a legal category, and instead seeks to make the caretaker/child relationship the core of the family unit.<sup>112</sup>

Although Fineman’s theoretical perspective seems exactly right, in that she questions the privileged role of the nuclear family and the label of deviance for those outside of it, her solution to privatize adult relationships is still somewhat problematic.<sup>113</sup> Although this approach seems to place everyone in a similar position vis-à-vis the law, it fails to consider the realities of people’s lives. Individuals will continue to form significant and intimate relationships that are distinctly different from the prototypical “arms-length” relationships usually considered within the legal context. Insofar as that is the case, it is necessary that the law be able to provide the most humane and effective way to deal with these intimate and emotional relationships.

Furthermore, same-sex couples and other deviant family forms are currently living with privatized relationships that are “not sanctioned, privileged, or preferred by law.”<sup>114</sup> However, as shown in the foregoing sections, the results have been highly problematic. Even those who know that the law will not protect them sometimes fail to establish power of attorney, a will, contracts regarding the dissolution of a relationship,

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<sup>107</sup> *Id.* at 133.

<sup>108</sup> *Id.*

<sup>109</sup> FINEMAN, *supra* note 79.

<sup>110</sup> *Id.* at 1.

<sup>111</sup> *Id.* at 3.

<sup>112</sup> *Id.* at 4.

<sup>113</sup> *Id.* at 6.

<sup>114</sup> *Id.* at 5.

and other legal documents.<sup>115</sup> Merely extending privatized relational status to married individuals would just extend such problem to a wider class of people. Instead, there needs to be some realization of the socially important and sustaining work that goes on within adult relationships, in addition to the caretaker/dependent model, by recognizing, protecting, and facilitating their functioning.

## II. THE TICKET SYSTEM

In the following pages, I will outline the foundation for a new theory of family called the Ticket System. To demonstrate how this system works, I will begin by applying it to the traditional nuclear family. Such focus and comparison is used only to make it conceptually easier to understand. Once the Ticket System is explained within the more traditional framework, I will then expand the discussion to the other ways in which it can operate. Finally, I will consider possible critiques of this approach.

### A. ADULTS' RELATIONSHIPS AND THE TICKET SYSTEM

At the age of eighteen, an individual would receive ten tickets.<sup>116</sup> Nine are designated "Interdependency Tickets" [hereinafter "Tickets"], and one is a Primary Interdependency Ticket [hereinafter "Primary Tickets"], which confer the type of benefits that the law typically presumes to flow towards one's spouse and can only be exchanged between adults.<sup>117</sup>

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<sup>115</sup> See *supra* Part I.B.1.

<sup>116</sup> The number ten was selected because it seems large enough to include most key individuals in one's life, and still small enough to be socially manageable. However, individuals can certainly exchange less than ten.

When I have spoken to people about this idea, many think ten is an enormous number, perhaps because when translated to the current system, it compares to a spouse and nine children. Being originally from Utah, the state with the largest family size in the nation, families of this size are not uncommon. However, the fact that some individuals receive tax breaks for their enormous families breeds resentment among smaller families who are paying a greater amount in taxes, despite using less state resources. See Dan Harrie, *Large Families' Tax Break May Shrink*, SALT LAKE TRIB., Feb. 14, 2001, at A1 (discussing a state bill that would limit the state tax break given to families of three or more members and funnel the increased revenue into public schools). However, if everyone could enter a benefited relationship with 10 people, if they so chose, then the resources would be much more fairly allocated across the board. People like Gail Ruzika, the president of Utah's ultra-conservative Eagle Forum and member of a family of 14, who worked to defeat the aforementioned bill, would not be able to count on the state to subsidize more than ten of her family members. *Id.* However, single people could enter into benefited relationships with their roommates, parents, friends, siblings, and nieces or nephews. Thus, everyone has the same opportunity to benefit from the legal designation "family," to the same degree.

<sup>117</sup> These benefits include preference in being appointed the personal representative of an intestate decedent; priority in being appointed guardian of an incapacitated individual or the right to act for an incapacitated person in making health care decisions; all manner of rights relating to the involuntary hospitalization of the individual, including the right to petition, the right to be notified, and the right to initiate proceeding leading to release; the right to bring

Tickets can be exchanged between individuals for the purpose of demonstrating that they are involved in an interdependent relationship. By exchanging Tickets, the parties can then gain access to benefits that are typically given only to nuclear families, such as health insurance,<sup>118</sup> immigration rights,<sup>119</sup> tax subsidies, and any other right presently conferred by only blood, marriage, or adoption. After a proscribed waiting period, 90 days for example, the Ticket would take effect.<sup>120</sup> These Tickets could be exchanged with anyone, including lovers, children, parents, siblings, grandparents, extended relatives, friends, strangers, etc. The only requirement is that Tickets of the same type are exchanged, so one cannot be in a benefited interdependent relationship with more than ten people at a time and may have only one Primary Ticket relationship (although one is still free to have a large family, many friends, and numerous interdependent relationships). If one wanted to end a Ticketed relationship, he or she would transfer the Ticket back over to the other party, and the other person would do the same.<sup>121</sup> Within a specified period of time, such as 90 days, the relationship would be dissolved<sup>122</sup> and both individuals would be free to exchange Tickets with another person.

For purposes of illustration, imagine a childless heterosexual adult couple seeking to marry. Under the Ticket System, the couple could still have any type of wedding ceremony that they wanted, including a religious service, but instead of signing a marriage license, the couple would exchange Tickets.

If they wanted their relationship to be similar to the current conception of marriage, they would exchange Primary Tickets. Prior to the ex-

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wrongful death suits and suits for the intentional infliction of emotional distress; the right to claim an evidentiary privilege for communication; the presumption of joint ownership or real estate as a tenancy in common, and the right not to be held to a mortgage of assignment of rights to creditors without the individual's written permission; the right to priority in claiming human remains and the right to make anatomical donations on behalf of the individual; inheritance rights, including priority in inheriting property of an intestate decedent, the right to a family allowance, and the rights to dower; and the right to receive social security benefits based on the individual's contribution and the survivor benefits of veterans. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 793 (1997).

<sup>118</sup> The right to benefits statutorily guaranteed to public employees, including health and life insurance and disability payments, plus similar contractual benefits for private sector employees. *Id.*

<sup>119</sup> Ticket holders would have the right to qualify as an "immediate relative," thus getting preferential immigration treatment and the right to citizenship. 8 U.S.C. § 1151(b)(2)(A)(i), § 1430(a), (b), (d).

<sup>120</sup> The waiting period ensures that people are committed to their decision, and acts as a protection against benefits being shifted based on who needs them at that moment.

<sup>121</sup> If one refused to return a Ticket at the request of the grantor, they would be compelled to do so through legal channels.

<sup>122</sup> Allowing for immediate dissolution would open the door to too much legal uncertainty.

change of Primary Tickets, it would possible for them to see a State-provided counselor to formulate an arrangement for the division of property upon dissolution of the relationship.<sup>123</sup> These counselors, similar to mediators, would help the individuals arrive at an understanding and would be trained to ensure that both parties are protected under the agreement.

Although the use of a counselor may seem like unnecessary State involvement, the State is already involved in the process of distributing property at the dissolution of a relationship. Rather than investing resources in divorce proceedings, the State would instead invest the resources at the beginning of the relationship, where they would do the most good. This process would prevent individuals from entering the relationship "without any information, communication, or realistic exchange with a partner."<sup>124</sup> By clarifying the expectations and wishes of the parties prior to formalizing their relationship, hopefully the union would be more enduring.

If a Primary Ticket couple chose not to go through the counseling process, there would be an automatic division of all property acquired during the relationship, and a pooling and equal division of all income earned following the dissolution of the relationship for a period equal to the time that they were in the Primary Ticket relationship. This would be to ensure that those traditionally disadvantaged by no-fault divorce schemes are adequately protected.<sup>125</sup>

If the couple did not exchange Primary Tickets, but one of the nine regular Tickets, their relationship would be a sort of "commitment-lite." This would be similar to couples that cohabitate under the current scheme. These individuals would not have the right to the other person's property upon death, the right to make key medical decisions and the like. These rights and responsibilities would rest with the Primary Ticket Holder, who could be a parent, best friend, or any other individual. Upon dissolution of the relationship, there would be no division of property, absent some sort of formalized arrangement prior to the exchange of Tickets.

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<sup>123</sup> If one were exchanging a ticket with a parent, best friend, or sibling, there may not be the same sort of property considerations, and the parties could contract to keep separate property and have no support obligations.

<sup>124</sup> Megan Gomola, *Something Old, Something New: On the "Romance" of Prenups*, CORNELL MAGAZINE, May/June 2001, at 24.

<sup>125</sup> WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 773 (discussing feminist critiques of no-fault divorce).

## B. CHILDREN'S RELATIONSHIPS AND THE TICKET SYSTEM

Because the relationships between adults and children are more complex due to the child's dependency, the Ticket System takes on a different form when applied to them. Upon birth, a child would be endowed with two Principal Dependency Tickets and eight Dependency Tickets. The parent or parents of the child would determine who holds these tickets. In the case of our above heterosexual couple, they could decide that they each want to be a Primary Ticket Holder for the child.

Unlike adult relationships, where the same types of Tickets must be exchanged, when an adult takes on the Primary Ticket of a child, they exchange one of their regular Tickets for one of the child's Primary Tickets. Thus, the parent in our scenario could hold the Primary Interdependent Ticket for their spouse, as well a Primary Dependency Ticket for their child.

Taking on the Primary Dependency Ticket of a child is an assurance that one will physically, financially, and emotionally support a child, until that child reaches the age of 18. In contrast to adult relationships, adult/child Primary Ticket relationships can only be revoked by the State.<sup>126</sup>

If each of the child's parents is holding a Primary Ticket, then there are still eight other Dependency Tickets that the parents may distribute. These can be given to grandparents, godparents, etc. When a Primary Ticket Holder gives a Ticket to another adult on behalf of a child, the parent is in effect sanctioning the formation of an enduring relationship. If a Primary Ticket Holder later decides to revoke a Ticket on behalf of the child, the former Ticket Holder can seek visitation from the court.<sup>127</sup> The point of allowing for continuing visitation is to ensure that there is a forum for determining the needs and wishes of the child, before the Primary Ticket Holder unilaterally denies anyone the right to the child.

This gives rise to one potential problem; parents may be reluctant to distribute Tickets, because they do not want to give up control of their child. Under the current system, where children are viewed in a manner similar to private property,<sup>128</sup> allowing others continued access to one's children is an uneasy proposition. However, courts are increasingly recognizing that children, even very young ones, form important relation-

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<sup>126</sup> The analogy to the current system would be when the State decides to terminate parental rights.

<sup>127</sup> Of course, when the Primary Ticket Holder is refusing access to a Ticket Holder because the interaction is harmful or dangerous to the child, then the courts will not sanction visitation.

<sup>128</sup> *Troxel v. Granville*, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting) ("But even a fit parent is capable of treating a child like a mere possession.").

ships with people other than their parents. As a result, rights to visitation are being extended to other individuals.<sup>129</sup>

Additionally, it is doing what is in the best interest of the child — giving them continued access to people with whom they have formed emotional bonds.<sup>130</sup> It is far too common that children are used as pawns in adult disputes. By initially giving the Primary Ticket Holder the right to distribute Tickets, but later asking the State to protect those relationships once the child and the Ticket Holder have formed a relationship, the likelihood that children will be caught in a tug of war between people they care about will be lessened.

Furthermore, this system offers parents added benefits and protections not found under the current arrangements. First, by designating a few Ticket Holders for their children, there is an assurance that a child would have continued visitation with important family members if death befell the parents/Primary Ticket Holders. Under the current system, once custody is passed on to someone else, it is not uncommon for grandparents and siblings to lose all visitation rights.<sup>131</sup> Also, by having a child exchange Tickets with another adult, that child will be entitled to any benefits that person may have.

Back to our hypothetical couple: they are now Primary Ticket Holders to one another, and are Primary Ticket Holders of their biological child. They decide that they want the infant child's grandparents to become Ticket Holders.<sup>132</sup> If the grandparents agree to this, the Tickets will be exchanged, and both the child, the child's parents, and the grand-

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<sup>129</sup> *Id.* at 64 (Despite holding that a Washington visitation statute was overbroad, the Supreme Court stated, "persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. . . . The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family."); see also *Settle v. Galloway*, 682 So. 2d 1032 (Miss. 1996) (granting visitation to grandparents because father was unable to exercise visitation rights due to military service); *O'Brien v. O'Brien*, 684 A.2d 1352 (N.H. 1996) (giving grandparents the standing to seek visitation with an out-of-wedlock child, although denying the grandparents' request because of a failure to justify intrusion on parental rights); *Peterson v. Peterson*, 559 N.W.2d 826 (N.D. 1997) (grandparents who were granted visitation during parents' separation had a right to continued visitation once parents reunited and objected); *Thrift v. Baldwin*, 473 S.E.2d 715 (Va. App. 1996) (granting biological grandparents and sibling visitation with children who had been adopted by third parties).

<sup>130</sup> Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 881 (1984).

<sup>131</sup> *Ward v. Dibble*, 683 So. 2d 666 (Fla. App. 1996) (denying maternal grandmother visitation with deceased daughter's children because there was no competent evidence that visitation was in children's best interests); *Ken R. on Behalf of C.R. v. Arthur Z.*, 682 A.2d 1267 (Pa. 1996) (holding that children do not have standing to seek court-ordered visitation with siblings).

<sup>132</sup> In the first three months after a child is born, all Tickets exchanges take effect immediately. After that time period, Ticket exchanges are subject to the 90-day waiting period before they take effect. See *supra* note 120 and accompanying text.

parents will know that there is an expectation that the grandparents will be involved in the child's life to a certain extent. In contributing to the welfare of the child, one grandparent may put the child on her health insurance, while another grandparent may decide to watch the child on the weekends. If the couple separates, and the mother/Primary Ticket Holder of the child has primary custody, she cannot then refuse the paternal grandparents access to the child.

Furthermore, to protect themselves, grandparents could stipulate that they want a recognized and continuous (i.e., Ticketed) relationship with their grandchild, before they begin to invest time and resources in that child. If a parent wants to remain in absolute control of a child, then she will not be able to expect the help of others in her community, unless there are assurances that all the relationships will be protected. This does not mean that grandparents or similar Ticket Holders have rights on par with parents/Primary Ticket Holders. Primary Ticket Holders can continue to set limits, and expect Ticket Holders to respect their wishes in bringing up the child.

This system still provides the stability of a traditional nuclear family, but also ensures that children's needs and relationships will be protected, even when adult relationships deteriorate. Furthermore, it creates a greater acknowledgement of the many different types of caretaking work that goes on in families. Currently, most parents have to rely on others to help in the task of nurturing children. Yet, despite the roles of many people in raising a child, parents continue to view children as their private and discrete property. By explicitly acknowledging the many roles that people play in a child's life, it becomes more likely that these roles will proliferate for the benefit of all those involved in the relationship.

As a child ages, his voice in the Ticketing process should become more recognized.<sup>133</sup> Primary Ticket Holders are still involved in the process until the child reaches the age of majority, and must initiate or agree to the Ticket exchange, but as the child increases in maturity, her/his role in the process becomes greater. At a certain age, somewhere between ten and twelve, a child should be allowed to have veto power over the exchange of Tickets suggested by the Primary Ticket Holder.<sup>134</sup>

When children reach eighteen, they start over with a clean slate. They are given one Primary Interdependency Ticket and nine regular In-

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<sup>133</sup> Barbara Bennett Woodhouse, "Out of Children's Needs, Children's Rights:" *The Child's Voice in Defining the Family*, 8 B.Y.U. J. PUB. L. 321, 340 (1994). ("Law should empower [children] to act as subjects in shaping their identities according to their emerging capacity, rather than treating them as objects.").

<sup>134</sup> For example, if a child does not want to have a Ticketed relationship with a parent's new spouse, then the parent should not be able to compel her/him to do this.

terdependency Tickets, which they can redistribute in any manner they choose. Within three months of an individual's eighteenth birthday, all Tickets exchanges take effect immediately. After that time there is the usual ninety-day waiting period.

### C. APPLICATION OF THE TICKET SYSTEM TO NONTRADITIONAL RELATIONSHIPS

To illustrate how the Ticket System would operate within nontraditional families, I will apply it to two court cases where the results reached were less than ideal.

In the case *In re Thomas S. v. Robin Y.*, a lesbian couple employed artificial insemination in order to have a child.<sup>135</sup> The women selected a gay man as their sperm donor and subsequently bore a child.<sup>136</sup> The child had limited contact with the sperm donor/biological father until the age of three.<sup>137</sup> At that time the mothers made arrangements for the child to meet the biological father.<sup>138</sup> Over the next few years the biological father would pay visits to the child and her mothers.<sup>139</sup> Eventually, the biological father desired a more pronounced role in the child's life.<sup>140</sup> The mothers wanted visitation to continue on the same level that it had in the past, but did not want the biological father to establish a paternal relationship.<sup>141</sup>

The father brought the case to court, and on appeal, the New York Supreme Court awarded him parental rights with the possibility of visitation.<sup>142</sup> In this case, the court decided as they usually do, by looking to biology to determine parenthood.<sup>143</sup> Courts continually apply such outdated precedent, rather than looking to the actual intention of the parties, or even the best interest of the child.<sup>144</sup> It is clear that in this case, the sperm donor had no intention of becoming a functioning parent to the child.

If the Ticket System were in place, then the events would unfold quite differently. I will assume that both of the women work and that at least one of them has health insurance. First, the lesbian mothers could be Primary Interdependency Ticket Holders for one another, thus giving

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<sup>135</sup> *In re Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 357 (App. Div. 1994).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 358.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 362.

<sup>143</sup> *Id.* at 359. States typically do not recognize relationships formed by adults other than the child's legal/biological parents, "unless the legal parents are unfit and have abandoned the child." Bartlett, *supra* note 130, at 881.

<sup>144</sup> *Thomas S.*, 618 N.Y.S.2d at 358.



them the benefits now reserved for married couples. They would be able to file a joint income tax return, could use one party's insurance to pay for the expenses associated with pregnancy and delivery, and could use the Family and Medical Leave Act or various other private parental leave to be present for the birth of the child. Once the child is born the mothers could claim the child as a dependent for tax purposes, and the healthcare benefits of one of the mothers for the child. Both mothers would be recognized Primary Dependency Ticket Holders for the child, and would have all the legal rights that parents have under the current system.

In deciding who they would like to use as a sperm donor, the women could make it clear to the donor that they would be the Primary Dependency Ticket Holders for the child, giving them primary guardianship until the child reaches eighteen. If both the mothers and the donor wanted to allow the child to have some form of relationship with the sperm donor/biological father, they could allow him to exchange regular Tickets with the child. The exchange of regular Tickets would signal to all of the parties that the donor would have a role in the child's life, albeit a lesser one. The donor/biological father would have the assurance of a relationship with the child, but the mothers/Primary Ticket Holder would have the ultimate authority to decide the form that relationship would take. If for some reason the mothers denied the donor/biological father the right to a reasonable relationship with the child, he could use the courts to compel visitation.

In the case of *INS v. Hector*, the limited definition of family was also harmful. In that case a woman who had been in the country for seven years sought to avoid deportation due to the fact that she was raising her two adolescent nieces.<sup>145</sup> Despite the fact that "Hector's relationship with her nieces closely resembles a parent-child relationship" she did not meet the statutory definition, and was subject to deportation.<sup>146</sup>

Under the Ticket System, Ms. Hector could exchange Primary Tickets with her nieces, thereby establishing the rights and privileges currently only given to parents. This would allow Ms. Hector to remain in the country and avoid the disruption of their family unit.

#### D. POSSIBLE CRITIQUES AND RESPONSES

The most obvious shortcoming is that it seems rather unlikely that any state is going to rush out to pass "The Uniform Inter/Dependency Ticket Act." This model, although similar to what many communities informally do, may be conceptually difficult for many to comprehend.

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<sup>145</sup> *INS v. Hector*, 479 U.S. 85 (1989).

<sup>146</sup> *Id.* at 90.

The possibility of a family existing without connection to blood or marriage may just be too radical. I would hope that the added practical benefits to everyone,<sup>147</sup> such as the ability for an individual to put his elderly mother, adult children, or grandchildren on his health insurance, would make one more willing to consider this an option.

Even if it were possible to convince people to sign on to this system, it would still be difficult to gain the support of government and businesses. Currently, the government and corporations are doing little to support various forms of care taking, although they certainly benefit from its occurrence.<sup>148</sup> Because there is no requirement for corporations to provide health insurance, there is the risk that they would discontinue it and other benefits completely, rather than pay the added costs.<sup>149</sup> Thus, before this system were to take effect, it would be necessary to have some sort of universal healthcare, or a government mandate for employers to provide families minimum healthcare benefits, much like the minimum wage requirement.

Although corporations would probably be spending more money, there is the possibility that the government would be spending less. Because people could be placed on their Ticketed family member's insurance, many could be moved off of government programs like Medicare and Medicaid. This in turn, may give the government more money to invest in the economy, or allow them to lessen the tax burden on individuals.

### III. CONCLUSION

Despite the possible shortcomings, the advantages of the Ticket System seem to be great. Unlike the current system, the Ticket System explicitly recognizes and values the work done by multifarious family forms. Thus, the Ticket System can explicitly benefit those families traditionally denied protection at law. The Western and bourgeois concept of the nuclear family disadvantages people of color, those in poverty, and others who, out of custom and necessity, are much more likely to rely on extended kinship structures to do the work of the family.<sup>150</sup> These individuals are performing the same valuable work for society that the nuclear families are; yet these groups are denied the same benefits. Under the Ticket System, the devaluation of alternate family forms is lessened.

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<sup>147</sup> With the exception of those that already have ten or more dependents.

<sup>148</sup> This trend may be changing, with many companies offering same-sex and cohabitating couples benefits in order to attract and maintain top employees. *America's Talent Battle, the Real Meaning of Empowerment: How to Recruit and Keep the Best Workers is Now the Biggest Challenge Facing Many America Firms*, *ECONOMIST*, Mar. 25, 2000, available at 2000 WL 8141232.

<sup>149</sup> Franklin, *supra* note 4, at 1047.

<sup>150</sup> Franklin, *supra* note 4, at 1047.

Also, the Ticket System explicitly recognizes that interdependency within society is a necessity, as well as a good, and as such, should be rewarded by government benefits.<sup>151</sup> Social recognition of the importance of interdependent relationships has the power to create an ideological shift in our collective consciousness, creating a society less obsessed with the notions of autonomy and individual liberties, and more focused on the communal good. Such a re-conception could also lead to changes in international, environmental, and social policy.

Despite the fact that my argument is somewhat utopian, I ultimately hope that it will prompt a creative consideration of the way that we as a society choose to define families, and make law and policy makers aware of the fact that there are many that are being unfairly denied the benefits and the protections of the law. In the last fifty years, familial arrangements have drastically changed; it is time for our laws and policies to reflect these changes. To truly strengthen the family in our society, we need to acknowledge and support the valuable work that families are doing, regardless of form.

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<sup>151</sup> FINEMAN, *supra* note 79, at 161-66.